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## VEERAMOHAN VEERIAH & ANOR v. SETHURAJA VAITHIYALINGAM & ANOR

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING J
[CIVIL SUIT NO: BA-12B-30-03-2020]
B 7 JUNE 2021

***ROAD TRAFFIC:*** *Accident – Liability – Liability of insurer – Recovery claim for third party risk insurance claim – Ingredients for claim in liability against insured/ wrongdoer and insurer – Whether claimants had to prove case against insurer in* C *same way as insured – Whether insurer liable – Whether claimants required to prove liability in tort of negligence in recovery proceeding – Road Transport Act 1987, s. 96(1)*

***INSURANCE:*** *Accident – Liability – Liability of insurer – Third party risk insurance claim – Ingredients for claim in liability against insured/wrongdoer and* D *insurer – Whether claimants had to prove case against insurer in same way as insured – Whether insurer liable – Claimants required to prove liability in tort of negligence in recovery proceeding – Road Transport Act 1987, s. 96(1)*

This was an appeal by the appellants ('plaintiffs') against the decision of the E Sessions Court Judge ('SCJ') in dismissing their claim against the second respondent ('second defendant') in a motor vehicle claim. In the Sessions Court, the first plaintiff's narrative was that he was a riding a motor vehicle when the first respondent's ('first defendant') motor vehicle came out from a side road on his right and collided onto him. The first defendant did not enter appearance nor filed a statement of defence. As such, there was no F version offered by the first defendant as to how the accident occurred. The second defendant was the insurer of the first defendant's motor vehicle. The plaintiff did not sue the second defendant at the Sessions Court when they filed the action. The second defendant took out an intervener action and added itself as a defendant in the action. The second defendant denied G liability as an insurer for a third party risk insurance claim pursuant to s. 96(1) of the Road Transport Act 1987 ('RTA') and submitted that the plaintiffs' claim was a fraudulent claim and that the first plaintiff was not involved in an accident with the first defendant's motor vehicle. Before the full trial of the plaintiffs' case, a judgment-in-default ('JID') was entered H against the first defendant. The SCJ proceeded with the full trial for the plaintiffs' claim against the second defendant. At the end of the plaintiffs' case, the SCJ held that the plaintiffs failed to prove their case against the second defendant after accepting the second defendant's submission that there was 'no case to answer'. In this appeal, the plaintiffs appealed against the I liability of the second defendant.

**Held (allowing appeal and setting aside SCJ's finding):**

**(1)** The SCJ misdirected himself in the proceedings by deciding that for a recovery proceeding, the plaintiffs had to prove their case against the insurer in the same way they had to prove their case against the insured, despite the fact that a JID had already been entered against the insured. In order to prove a claim in liability against the insured/wrongdoer in an accident case, the plaintiff would essentially have to prove the elements of the tort of negligence, *ie*, the insured/wrongdoer owes a duty of care, the insured/wrongdoer breaches that duty and, as a result of the breach, the plaintiff suffers loss and damage. The ingredients for recovery claim for a third party risk insurance claim under the RTA are very different from the ingredients for the claim in liability against the insured/wrongdoer. The SCJ erred in requiring the plaintiff to prove their case against the insurer based on a liability claim instead of a case based on a statutory claim *ie*, a third party risk insurance claim in a recovery proceeding. (paras 21, 22 & 26)

**(2)** The JID was entered against the first defendant before the trial commenced against the second defendant. In other words, the plaintiffs were armed with a judgment against the second defendant to pay the judgment sum as an insurer for the insured in the recovery claim. The enforceability of a default judgment is as good as a judgment based on merits. A default judgment is still a judgment of the court until and unless it is set aside. The plaintiffs were entitled to enforce the default judgment against an insurer under the RTA in the recovery proceedings. The plaintiffs were not required to prove liability in tort of negligence in a recovery proceeding because the cause of action against the insurer under the RTA was not based on tort of negligence. All that the plaintiffs were required to prove were the ingredients for a statutory claim. It was the second defendant who pleaded 'fraudulent claim'. Therefore, it was for the second defendant to lead evidence for its case that the plaintiffs' claim was a fraudulent one. Unfortunately, the second defendant did not lead a shred of evidence in its defence. (paras 31, 34 & 35)

**(3)** The JID stood valid and enforceable and as such, since the second defendant failed to lead evidence in its defence, judgment was entered against the second defendant based on the JID. (para 39)

**Case(s) referred to:**

*Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA* ***(refd)***

*Mohamad Shafiq Abdul Samad v. Pacific & Orient Insurance Co Bhd [2019] 1 LNS 1701 HC* ***(refd)***

*Mohd Izzuddin Syukri Ishak v. Pacific & Orient Co Bhd & Anor [2019] 1 LNS 1999 HC* ***(refd)***

*Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA* ***(refd)***

*Muhammad Zaihasri Hassan v. Pacific & Orient Insurance Co Bhd [2019] 3 CLJ 530 HC* ***(refd)***
*Newfield Peninsula Malaysia Inc v. The Owners Of The Ship Or Vessel "Tanjung Pinang 1" [2012] 1 LNS 1084 HC* ***(dist)***
*Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA* ***(refd)***

**Legislation referred to:**
Road Transport Act 1987, s. 96(1)

*For the appellants - Krishna Vaine Indiran; M/s Chand, Jag & Assocs*
*For the respondents - Archana Devi Thirumalai; M/s Viknes Ratna & Co*

*[Editor's note: Appeal from Sessions Court; Summons No: BA-B53KJ-45-08-2018.]*

*Reported by Lina E*

## JUDGMENT

**Choo Kah Sing J:**

### Introduction

**[1]** This is an appeal filed by the appellants who were the plaintiffs at the court below against the decision of the Sessions Court Judge (hereafter "SCJ") in dismissing their claims against the second respondent, or the second defendant at the court below.

**[2]** On 7 May 2021, this court, after having heard the parties' counsel's oral submissions and read their written submissions respectively, allowed the appellants' appeal. The reasons for the decision are set out below. The parties hereafter shall be referred to as their positions at the court below.

### Brief Facts

**[3]** This is a motor vehicle accident claim. On 29 October 2012, the first plaintiff riding a motor vehicle BJV 1463 met an accident. The first plaintiff's narrative was that a motor vehicle BLR 7048 came out from a side road on his right and collided onto him. The first defendant was the rider of motor vehicle BLR 7048. The first defendant did not enter appearance, neither did he file a statement of defence. As such, there was no version offered by the first defendant as to how the accident occurred.

**[4]** The second defendant was the insurer of the motor vehicle BLR 7048. The plaintiffs did not sue the second defendant when they filed the action in August 2018. The second defendant took out an intervener action and added itself as a defendant in the action. On 19 October 2018, the second defendant was granted the order to be named as the second defendant in the action.

**[5]** In gist, the second defendant denied liability as an insurer for a third party risk insurance claim pursuant to s. 96(1) of the Road Transport Act 1987 (hereafter "the RTA"). The second defendant averred in its statement

of defence that the plaintiffs' claim was a fraudulent claim. It pleaded that the first plaintiff was not involved in an accident with motor vehicle BLR 7048.

**[6]** On 13 February 2019, before the full trial of the plaintiffs' case, a judgment-in-default was entered against the first defendant (hereafter "the JID"). This court observes that the second defendant did pray for an order for judgment-in-default not to be entered against the first defendant in its application to intervene, which, unfortunately, was not granted by the SCJ. No application to set aside the JID was filed; therefore, the JID against the first defendant was valid and enforceable at all material times.

**[7]** The SCJ decided to proceed with the full trial for the plaintiffs' claim against the second defendant. At the end of the plaintiffs' case, the SCJ decided that the plaintiffs had failed to prove their case against the second defendant after accepting the second defendant's submission that there was "no case to answer" at the close of the plaintiffs' case. Dissatisfied with the decision of the SCJ, the plaintiffs appealed to the High Court.

**The Findings Of This Court**

**[8]** At the High Court, the plaintiffs withdrew their appeal against quantum, and proceeded to appeal only on liability in respect of the claim against the second defendant.

**[9]** In the memorandum of appeal, the plaintiffs raised many grounds of appeal. The complaints raised were mainly related to the findings of facts of the SCJ. However, one complaint caught the attention of this court, namely, item 9 which states as follows:

> Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa pihak Defendan telah memilih untuk berhujah 'no case to answer'. Atas alasan pihak Plaintif tidak membuktikan kes atas imbangan kebarangkalian kerana terdapat pencanggahan di dalam keterangan Plaintif dan pemboceng motosikal Plaintif.

**[10]** This court, after having scrutinised the proceedings at the court below and having taken into consideration the directions the SCJ had made, finds that the SCJ had committed a serious error of law which warrants this court to interfere with the decision made by the court below, particularly as a result of the complaint raised in item 9 above.

**[11]** Based on the complaint in item 9 of the memorandum of appeal, the SCJ had taken into account that the plaintiffs had failed to prove their case against the second defendant, and he had accepted the second defendant's counsel's submission of "no case to answer". This court finds the SCJ had made a serious error of law that merits an intervention.

**[12]** This court is of the considered view that the SCJ had made an error of law in that the SCJ had required the plaintiffs to prove their case against the second defendant akin to proving their case against the first defendant.

**[13]** According to the SCJ's alasan penghakiman (p. 19, rekod rayuan tambahan, para. [7]), he stated as follows:

> ... Mahkamah berpendapat dalam keadaan di mana JID telah pun dimasukkan ke atas Defendan Pertama, maka tuntutan kedua-dua pihak Plaintif terhadap Defendan Kedua adalah tuntutan yang bersifat recovery proceeding. Di dalam prosiding sebegini Plaintif masih perlu membuktikan tuntutannya terhadap Defendan Kedua walaupun JID telah dimasukkan ke atas Defendan Pertama.

**[14]** At para. [8], the SCJ went on to state as follows:

> ... mendapati kedua-dua pihak Plaintif di dalam tindakan ini telah gagal membuktikan bahawa punca kepada berlakunya kemalangan pada 29 Oktober 2012 adalah **disebabkan oleh kecuaian Defendan Pertama**. Oleh yang demikian Mahkamah menolak tuntutan-tuntutan kedua-dua pihak Plaintif terhadap Defendan Kedua dengan kos.
>
> (emphasis added)

**[15]** The SCJ was correct to say that the plaintiffs' cause of action against the first defendant was different from their cause of action against the second defendant. The former was based on a negligence claim; whereas, the latter was based on a "recovery proceeding" claim pursuant to the RTA (see paras. 24 to 26 (in part)).

**[16]** However, the SCJ fell into grave error when he relied on the case of *Newfield Peninsula Malaysia Inc v. The Owners Of The Ship Or Vessel "Tanjung Pinang 1"* [2012] 1 LNS 1084; [2013] 10 MLJ 650 to support his reasoning that the plaintiffs were required in law to prove their case against the second defendant as if they were proving their case against the first defendant.

**[17]** The *Newfield Peninsula Malaysia* (*supra*) case concerns a first party insurance claim, not a third party risk insurance claim. The insurer, after having paid the insured, is entitled to bring an action against the wrongdoer for recovery under the equitable doctrine of subrogation. But, the insurer has to sue under the insured's name when the insured is called upon to recover the money paid under the first party insurance. In these circumstances, the party who sue is required to prove its case against the wrongdoer. The principles in *Newfield Peninsula Malaysia* are not applicable to the facts of the instant case.

**[18]** In the present case, the plaintiffs did not sue the second defendant. It was the second defendant who applied to be added as a defendant to deny responsibility under the third party risk insurance. The facts are totally different from the facts of *Newfield Peninsula Malaysia*.

**[19]** The SCJ had relied on two High Court decisions, namely, *Mohamad Shafiq Abdul Samad v. Pacific & Orient Insurance Co Bhd* [2019] 1 LNS 1701 and *Muhammad Zaihasri Hassan v. Pacific & Orient Insurance Co Bhd* [2019] 3 CLJ 530 to come to the conclusion that the JID could not bind the second defendant, because the JID was entered based on a different cause of action against the second defendant.

**[20]** This court has no issue with the findings as well as the principles decided by the two High Courts. In *Mohamad Shafiq Abdul Samad* (*supra*), it was decided that the insurer was entitled to raise defences available to it at the recovery proceedings, ever though a judgment had been entered against the insured. In *Muhammad Zaihasri Hassan* (*supra*), it was decided that the insurer must raise its defences in the liability proceeding once the insurer has opted to become a party to the liability proceeding against the insured. The difference between the two High Court decisions is that in the former there was a judgment obtained against the insured; whereas, in the latter no judgment was entered against the insured at the material time.

**[21]** In the present case, the essence of the plaintiffs' complaint was that the SCJ had decided that for a recovery proceeding the plaintiffs had to prove their case on liability against the insurer in the same way they have to prove their case against the insured, despite the fact that a JID had already been entered against the insured. This court is of the considered view that the SCJ had misdirected himself in the proceeding.

**[22]** In order to prove a claim in liability against the insured/wrongdoer in an accident case, the plaintiff essentially would have to prove the elements of the tort of negligence, ie, the insured/wrongdoer owes a duty of care, the insured/wrongdoer breaches that duty, and as a result of the breach, the plaintiff suffers loss and damage. The ingredients for a recovery claim for a third party risk insurance claim under the RTA are very different from the ingredients for the claim in liability against the insured/wrongdoer.

**[23]** The ingredients for a recovery claim for a third party risk insurance claim are as stated in the Court of Appeal decision in the judgment of Justice Abdul Malik Ishak JCA (as he then was) in *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866, p. 878:

> [29] And it (referring to s. 96(1) of the RTA) allows a party who has no contractual relationship with the insurers and who has no claim in tort against the insurers to file a suit against the insurers. However, s. 96(1) of the RTA cannot be read in isolation. It must be read with s. 91 sub-section (1)(a) and sub-section (1)(b) of the RTA and they are worded as follows:
>
> Requirements in respect of policies
>
> 91(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which:

A (a) is issued by a person who is an authorised insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any B person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

[30] In plain language, it means that for a motor vehicle insurance to be valid, the policy must be issued by a licensed insurance company and it must cover "such person, or class of persons as may be specified in the policy in respect of any liability which may be insured" by those persons C which result in death or bodily injuries to other persons arising out of the use of the motor vehicle. Thus, the obligation of the insurers to pay judgments under s. 96(1) of the RTA will only arise if it can be shown that the tortfeasors are persons that fall within the class of persons covered by the policy.

D **[24]** Based on the above paragraph, it could be surmised that the ingredients for a third party risk insurance claim in a recovery proceeding are as follows:

(i) there must be a valid motor insurance policy issued by a licensed insurance company; and E

(ii) the insurance policy must cover the insured/wrongdoer/tortfeasor *vis-à-vis* persons that fall within the class of persons covered by the policy; and

(iii) the death or bodily injuries caused was arising out of the use of the motor F vehicle which was insured under the valid motor insurance policy.

**[25]** In the same case, Justice Abdull Hamid Embong JCA (as he then was), pp. 875 to 816, stated as follows:

[20] It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is G based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.

[21] In the liability action, the issue before the court would be to H determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of s. 91 and s. 96 of the RTA.

**[26]** Based on the above legal propositions enunciated by the Court of Appeal, the SCJ had erred in requiring the plaintiffs to prove their case I against the insurer based on a liability claim, instead of a case based on a statutory claim, ie, a third party risk insurance claim in a recovery proceeding.

**[27]** All the plaintiffs were required to prove against the second defendant was that the second defendant was a licensed insurance company and had issued the insurance policy for the motor vehicle BLR 7048, and that the first defendant was within the class of persons insured under the insurance policy, and that the first plaintiff's injury was caused by the motor vehicle insured by the second defendant. It is then for the second defendant to prove its defence that the second defendant's injury was not caused by the motor vehicle BLR 7048 which was insured by the second defendant, ie, the defence of "fraudulent claim".

**[28]** The SCJ tried the matter on the basis that the plaintiff was required to prove a statutory claim like a liability claim in tort. The SCJ proceeded with the trial as if it was a liability claim in tort and insisted that the plaintiffs had to prove the first defendant was negligent. Upon the close of the plaintiffs' case, the second defendant elected to submit "no case to answer". In other words, the defendant elected not to rely on its defence, but accepted the plaintiffs' case on the face value, and asserted that there no case had been established in law or that the evidence led by the plaintiff was so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. (See *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81, (CA). It is on this premise that the SCJ decided the plaintiffs had failed to prove their case, ie, a case of liability in tort claim, not a statutory claim under the RTA. On this account, this court is of the opinion that the SCJ had misdirected himself on the evaluation of the evidence and the procedure in coming to his decision.

**[29]** There is a clear distinction between a claim under liability in tort action and a claim under the RTA. Generally, in a liability in tort claim, the injured person will sue the insured/tortfeasor. The insurer will step in to defend the liability in tort claim in the name of the insured. Occasionally, the insurer would want to defend itself in the liability in tort claim in the sense that the insurer is not liable under the insurance policy. The insurer will then intervene to be added as a party in the action, and not step in on behalf of the insured. If the insurer is made a party to the proceeding before liability is established, the insurer will participate in the cross-examination of the plaintiff's witnesses as well as defend its position as an insurer. At the same time, the insurer would also defend the statutory claim, ie, a recovery proceeding, against it in the event liability is established at the end of the trial. In these circumstances, the insurer is not precluded from defending the liability in tort claim when defending the recovery proceeding claim.

**[30]** In *Muhammad Zaihasri Hassan* (*supra*), para. [46], it was held that "It stands to reason that once the insurer has been made a party to the liability proceeding, it will no longer be necessary for separate recovery proceedings to be filed pursuant to s. 96(1) of the Road Transport Act 1987. Any finding of liability by the court will automatically bind the insurer".

**[31]** In this instant case, the JID was entered against the insured (first defendant) before the trial commenced against the insurer (second defendant). In other words, the plaintiffs were armed with a judgment against the second defendant to pay the judgment sum as an insurer for the insured in the recovery claim.

**[32]** The second defendant's counsel relied on a High Court decision in *Mohd Izzuddin Syukri Ishak v. Pacific & Orient Co Bhd & Anor* [2019] 1 LNS 1999 to say that: "... the plaintiff is not entitled to take an in-default judgment as a final judgment to get the payment of compensation without proving his case on liability ... ". The defendant's counsel submitted that the SCJ was correct to direct the plaintiffs to prove their case against the second defendant. The defendant's counsel also relied on the paragraph of the judgment which states as follows:

> [56] The in-default judgment cannot form the basis for the plaintiff to apply to enforce the judgment. The plaintiff must lead evidence regarding the accident and ought to have shown through that evidence that the second defendant was involved and was negligent ...

**[33]** This court, with respect, could not agree with the proposition of the case cited by the second defendant's counsel.

**[34]** This court is of the considered view that the enforceability of a default judgment is as good as a judgment based on merits. A default judgment is still a judgment of the court until and unless it is set aside.

**[35]** This court is of the considered view that the plaintiffs were entitled to enforce the default judgment against an insurer under the RTA in the recovery proceeding. The plaintiffs were not required to prove liability in tort of negligence in a recovery proceeding, because the cause of action against the insurer under the RTA is not based on tort of negligence. All the plaintiffs were required to prove are the ingredients for statutory claim as explicated above. It was the second defendant who pleaded "fraudulent claim", therefore, it was for the second defendant to lead evidence for its case that the plaintiffs' claim was a fraudulent one. Unfortunately, the second defendant did not lead a shred of evidence in its defence.

**[36]** In *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, p. 957, the Court of Appeal recognised that a judgment obtained against the insured, was indeed, a judgment against the insurer, and as it involved a monetary judgment which has not been stayed, the judgment creditor has the right under s. 96(1) to enforce the said judgment against the insurer without the need to first file a recovery proceeding against the insurer.

**[37]** The legal proposition of the above Court of Appeal case postulates that the JID obtained by the plaintiffs against the first defendant, the insured, was a judgment that was enforceable against the second defendant as the insurer for the insured. Hence, the SCJ went into error when he required the plaintiffs to prove liability against the second defendant, the insurer, in the recovery proceeding.

**[38]** The SCJ had tried the case against the second defendant based on wrong legal principles and wrong evaluation of evidence in the proceedings, and therefore, fell into error in his finding that the plaintiffs failed to prove their case against the second defendant. This court does not intend to delve into the other findings of the SCJ, as all the findings were based on a wrong evaluation of the law and procedure.

## Conclusion

**[39]** Based on the above reasoning, this court had no choice but to set aside the SCJ's finding and allow the plaintiffs' appeal. The JID stands, valid and enforceable, as such, since the second defendant failed to lead evidence in its defence, therefore, this court entered judgment against the second defendant based on the JID. The plaintiffs' appeal was allowed with costs of RM5,000 to be paid by the second defendant to the plaintiffs.